IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

SECOND APPEAL NO. 86 OF 2003

1. Esso Raghu Khandolkar,

2. Vatsala E. Khandolkar,
residing at Bag, Khandola. .... Appellants.

Versus

1. Mr. Sonu Esso Khandolkar,
deceased by his legal representatives;

1(a) Mr. Jaganath Sonu Khandolkar,
1(b) Mrs. Sudha Jaganath Khandolkar,
1(c) Mr. Datta Sonu Khandolkar,
1(d) Mr. Gajanan Sonu Khandolkar
all residing at Tamsule,
Khandola, Marcela, Goa.

2. Mr. Ladu Anant Naik, deceased
by his legal representatives;

2(a) Anant Mhasu Naik,
2(b) Yashoda Anant Naik
Tamsule, Khandola,
Marcela, Goa. .... Respondents

Shri R.V. Kamat, Advocate for the Appellants.

Shri S.D. Lotlikar, Sr. Advocate with Ms. Shambhavi Rao, Advocates for the Respondents.

CORAM : **P.V. KAKADE, J.**

DATE : **17th NOVEMBER, 2006**

JUDGMENT :

Heard the learned Counsel for both the parties. Perused the record.

2. This is an appeal preferred by the unsuccessful plaintiffs against the judgment and order passed by the Additional District Judge, Panaji allowing the appeal and setting aside the judgment and decree passed by the trial Court, wherein the suit of the present appellants/plaintiffs came to be decreed by the Civil Judge, Junior Division, Ponda.

3. The appellants/plaintiffs filed the suit against the defendants for declaration, to the effect that they had lease hold rights to the area of 21 sq. mts. of land occupied by the suit structure in which the suit gada was located as against the defendant no.6, to direct the defendants to handover to the plaintiffs, the suit structure in which the suit gada was located and to restrain the defendants no. 1 to 5 by permanent injunction from entering, interfering with and disturbing the plaintiffs' possession and for direction to the defendants to pay compensation of Rs. 50/- per day from 16/02/1987 up to the date of handing over the possession of the suit structure. The

plaintiffs' case was that they were the leaseholders of the said portion admeasuring 21 sq. mts. of land from survey no. 97/2 of Village Khandola of Ponda Taluka, which survey holding belonged to defendant no.6 and that with the consent of defendant no.6, they had erected the suit structure, made of mud and stone pillars and covered with mangalore tiles, in the said leased portion and further that in this suit structure they had installed the suit gada for sale of beedies, cigarettes, eatables etc. and other sanitary articles. It was the case sought to be made out by the plaintiffs that the suit structure and suit gada were existing in the said place for more than 20 years and the gada was always run and managed by the plaintiffs and the said lease was created by the father of defendant no.6 in favour of the father of the plaintiff no.1, on oral understanding on a monthly rent of Rs. 10/- as ground rent. The defendant no.1 is the uncle of plaintiff no.1, the defendants no. 2, 4 and 5 are the sons of the defendant no.1 and defendant no.3 is the wife of the defendant no.2. The plaintiffs alleged that the defendants no. 1 to 5 have their common residential house no. 204 at Bag Candola which has 4 divisions and in one of the said divisions the defendant no. 1 to 5 used to reside, in the second division the plaintiffs and his family resided, in the third division one Sagun Esso Candolcar and his family resided and in the fourth division one Mucund Esso Candolcar and his

family resided. According to the plaintiffs, sometime in February 1987, the defendants requested them to allow them to keep some articles in the suit structure stating that they wanted to carry out some repairs to the portion of the common house occupied by them and the plaintiffs agreed to allow the defendants to keep the said items for few days. The grievance of the plaintiffs was that the defendants taking advantage of the facilities given by the plaintiffs, on 15/02/1987, in the evening time, shifted themselves to the suit structure alongwith household items and forcibly started residing therein and refused to vacate. The plaintiffs lodged police complaint and, thereafter, visited the Mardol Outpost various times, but all in vein. Hence, the suit.

4. The defendants no. 1 to 5, inter alia, challenged the allegations made by the plaintiffs, submitting that those were false and the plaintiffs had no right title interest in the property. On the other hand, defendant no.6 by his written statement virtually supported the plaintiffs' claim.

5. The learned trial Judge after hearing both the parties and on the basis of available evidence, came to the conclusion that the plaintiffs have proved their case, and decreed the suit accordingly. The appeal was

carried to the District Court. The learned Additional District Judge, however, on hearing the parties did not concur with the findings recorded by the trial Court and took a view that the plaintiffs failed to support their allegations by cogent evidence, and available evidence was not sufficient to establish the allegations, and as such it was held that the suit was liable to be dismissed, and accordingly, the appeal came to be allowed.

Hence, the present appeal.

6. At the outset, it may be noted that the admission Court while admitting the appeal raised so called substantial question of law to the effect that whether the admission of the defendants that the electricity connection, water connection, registration with the Panchayat, inclusion of name in the electoral roll after filing of the suit are indications of possession of the plaintiffs prior to 1987. In my considered view, this cannot be a substantial question of law at all, as it is a question of fact. It was the case sought to be made out by the plaintiffs that he was in possession of the suit structure since prior to 1987 and in support of his such submission, according to him, the evidence was laid by him such as documents pertaining to the electricity connection, water connection, registration with the Panachayat and presentee of names in the electoral roll etc. in order to

show that he was in possession since the year 1987. However, it appears that the learned lower appellate Court Judge after appreciating the entire evidence in detail, came to the conclusion that so called documents were of no avail to the plaintiffs to hold that he was in possession of the suit property by virtue of his right as a lessee of defendant no.6 in the property. In fact, it appears on perusal of the evidence on record that the plaintiffs have not produced any title documents in favour of defendant no.6. As far as the said property is concerned, defendant no.6 did not enter the witness box at all. Therefore, the very plea that the plaintiffs were lessee of defendant no.6 is not established. Furthermore, there is not an iota of any evidence to show that defendant no.6 had any vested right, title, interest in the suit property to create lease in favour of the plaintiffs in the property. It is well settled that the survey records cannot prove or confer title and, therefore, it is to be kept in mind that the plaintiffs have prayed for declaration that they had leasehold rights in the area of 21 sq. mts. occupied by the suit structure in which there is a suit gada as against defendant no.6. The prayer includes the declaration of title of the defendant no.6 or his legal capacity to lease out the said area. Hence, unless the ownership (title) of the defendant no.6 or his legal capacity to lease out that land is proved, the plaintiffs cannot merely on the basis of

admission in written statement made by the father-in-law of the plaintiff no.1, prove any lease in their favour. There is no pleading as to when prior to 20 years the alleged lease was created. There is no document of lease. The oral evidence of the plaintiff no.1 (PW 1) is contrary to the pleadings. In fact PW 1, nowhere in his deposition, stated that they are the leaseholders of the said land. On the contrary, PW 1 has deposed that the said gada has been installed in the year 1976 by his father with the permission of the defendant no.6, but there is no evidence at all on record to show that father of defendant no.6 is or was owner of the said land.

7. It is the case sought to be made out by the plaintiffs that the so called leased area from survey no. 97/2 admeasures 21 sq. mts. and that there is suit structure in that entire area in which there is a suit gada for last more than 20 years. The survey plan (Exh. PW 1/A/Colly.) of survey no. 97/2 does not show any structure therein and the survey forms no. I & XIV also do not mention about any structure existing therein. Hence, the presumption under Section 105 of Land Revenue Code will be that no structure exists in survey no. 97/2. It should be remembered that the case of the defendants no. 1 to 5 from the beginning is that the gada constructed by the plaintiffs was existing in survey no. 97/3 which collapsed.

8. Hence, it was for the plaintiffs to cogently and convincingly prove existence of suit structure admeasuring 21 sq. mts. and of a suit gada therein, all in survey no. 97/2, in which task the plaintiffs have failed. Therefore, in my considered view, on perusal of the judgments of both the Courts below, it is apparent that the lower appellate Court has rightly held that the plaintiffs must fail in this suit, for want of proper and cogent evidence in support of their allegations and, therefore, I hold that the lower appellate Court has rightly reversed the findings recorded by the trial Court while adjudicating the dispute on merits.

9. In the result, the lower appellate Court appears to be correct in appreciating the entire evidence in proper perspective, which would brook no interference and as such the appeal stands dismissed with no order as to costs.

P.V. KAKADE, J.

NH